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Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Amendment of Section 73.202(b),	)	
Table of Allotments,	)	MB Docket No. 00-148
FM Broadcast Stations.	)	RM-9939
(Quanah, Archer City, Converse, Flatonia,	)	RM-10198
Georgetown, Ingram, Keller, Knox City,	)	
Lakeway, Lago Vista, Llano, McQueeney,	)	
Nolanville, San Antonio, Seymour, Waco and	)	
Wellington, Texas, and Ardmore, Durant,	)	
Elk City, Healdton, Lawton and Purcell,	)	
Oklahoma.)	)	

To: Assistant Chief, Audio Division
Media Bureau

RESPONSE TO REQUEST FOR SUPPLEMENTAL INFORMATION

On January 18, 2002, the Commission released a Request for Supplemental Information in the above-captioned proceeding (DA-02-158) requesting information regarding an agreement (including submission of the agreement) between A.M. & P.M. Broadcasters, LLC ("AM & PM") and First Broadcasting Co., L.P., Rawhide Radio, LLC., Next Media Licensing, Inc., Capstar TX Limited Partnership or Clear Channel Broadcasting Licenses, Inc., the Joint Parties, for the downgrade of Station KICM, Krum, Texas. The Joint Parties, by their respective counsel, hereby respond to that request.

1. The relevant background is as follows. On July 25, 2000, AM & PM filed an application to upgrade Station KICM from Channel 229C2 to Channel 229C1. On October 10, 2000, the Joint Parties filed their counterproposal, which included a proposal to substitute Channel 230C1 for Channel 248C1 at Archer City, Texas. Channel 230C1 at Archer City was short-spaced to the KICM application. To remedy this short spacing, certain of the Joint Parties

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entered into an agreement with AM & PM providing that if (i) AM & PM's application for Channel 229C1 at Krum were granted, and (ii) the Joint Parties' counterproposal were granted, AM & PM would file an application to downgrade Station KICM to Class C2 in exchange for compensation. On August 20, 2001, the KICM Class C1 application was granted.

2. Section 1.420(j) of the Commission's Rules does not apply to the agreement between AM & PM and the Joint Parties. That rule prohibits any party from withdrawing an expression of interest filed in a rule making proceeding in exchange for compensation in excess of its expenses.[1] The purpose of the rule is to deter abusive filings by removing the incentive to "ransom" the withdrawal of a conflicting filing for profit. *Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes*, 5 FCC Rcd 3911, 3914 (1990), *recon. denied*, 6 FCC Rcd 3380 (1991). Section 1.420(j) is inapplicable to the agreement because the agreement does not require or even contemplate any dismissal or withdrawal of any expression of interest.[2]

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[1] Section 1.420(j) of the Commission's Rules 47 C.F.R. § 1.420(j) states:

> Whenever an expression of interest in applying for, constructing, and operating a station has been filed in a proceeding to amend the FM or TV Table of Allotments, and the filing party seeks to dismiss or withdraw the expression of interest, either unilaterally or in exchange for financial consideration, that party must file with the Commission a request for approval of the dismissal or withdrawal, a copy of any written agreement related to the dismissal or withdrawal, and an affidavit setting forth:
>
> (1) A certification that neither the party withdrawing its interest nor its principals has received or will receive any money or other consideration in excess of legitimate and prudent expenses in exchange for the dismissal or withdrawal of the expression of interest;
>
> (2) The exact nature and amount of any consideration received or promised;
>
> (3) An itemized accounting of the expenses for which it seeks reimbursement; and
>
> (4) The terms of any oral agreement related to the dismissal or withdrawal of the expression of interest.

[2] The Commission has interpreted the term "expression of interest" to include an application that is filed by the comment date in a rule making proceeding. *See Detroit, Texas et al.*, 13 FCC Rcd

3. AM & PM has not dismissed or withdrawn its interest in constructing and operating a Class C1 station at Krum, Texas. If it had entered into an agreement to do so, AM & PM would have filed a request to dismiss its then pending Class C1 application. Instead, the Class C1 application was granted. It has been represented by AM & PM to the Joint Parties that AM & PM has taken steps toward constructing the Class C1 facility even before the instant Commission Request for Supplemental Information was released. Nor did AM & PM agree to *amend* its pending application. The application was previously amended several times in order to specify a transmitter site at which the station could be constructed but not as a result of any agreement with any of the Joint Parties.[3]

4. Not only did AM & PM *not* withdraw its expression of interest, it has *every* intention to construct and operate a Class C1 station at Krum, Texas. The Joint Parties' counterproposal has not been granted, and AM & PM is under no obligation to file an application to downgrade KICM to Class C2 until the counterproposal is granted and has become final. Should the Joint Parties counterproposal be denied, AM & PM is free to finish constructing or continue operating the Class C1 facility as the case may be. The Joint Parties submit that under these circumstances, Section 1.420(j) of the Commission's Rules is inapplicable. The Joint Parties strongly believe that they proceeded in good faith and in compliance with all Commission rules.

15591, 15594 [¶ 12] (Section 1.420(j) "applies to proposals that are 'functionally equivalent' to a counterproposal such as a one-step upgrade application filed by the comment date in the rulemaking proceeding").

[3] Indeed, at the time certain of the Joint Parties entered into the agreement with AM & PM they were aware that the Class C1 application was granted.

5. The Commission has routinely permitted agreements between rule making proponents and applicants in similar circumstances. In *Pauls Valley, Oklahoma, et al.*, 13 FCC Rcd 13458 (1998), the licensee at Sulphur, Oklahoma had previously been allocated a Class C2 channel. It applied for a Class C3 instead. Nevertheless it agreed to accommodate a counterproposal by downgrading from Class C3 to A should its Class C3 application be granted, in exchange for compensation in excess of expenses. The Commission held that the agreement complied with Section 1.420(j) because the applicant received no compensation in exchange for dismissing its application or forgoing to file an application for the higher class facilities. *Id.*, 13 FCC Rcd at 13460-61. The same exact situation exists here, where the application was granted and the applicant – now permittee – is free to construct the higher class facilities. In *Farmersville, Texas, et al.*, 12 FCC Rcd 4099, *recon. dismissed*, 12 FCC Rcd 12056, the licensee at Comanche, Oklahoma had previously been granted a Class C2 channel and had an application pending. Nevertheless it agreed to accommodate a rule making proposal by filing an application to downgrade from Class C2 to A in exchange for compensation in excess of expenses. The Commission held that the agreement complied with Section 1.420(j) because no payment was made in exchange for not pursuing Class C2 operation. *Id.*, 12 FCC Rcd at 4104.

6. Not only is the acceptance of such agreements consistent with past precedent, it is good policy, too. It is not an abuse of the Commission's processes for an applicant and a rule making proponent to agree upon a different arrangement of allotments that furthers the public interest. The Commission does not limit the compensation that can be paid to a licensee in exchange for changing its facilities, because to do so would limit the ability of private parties to maximize the use of the broadcast spectrum. Similarly, as long as an applicant is under no

obligation to withdraw, dismiss, or amend its application, there is no reason to treat the applicant any differently than a licensee.

7. Admittedly, when an applicant is paid to withdraw, dismiss, or amend its application, there is a danger of abuse. Thus, in *Detroit, Texas, et al.*, 13 FCC Rcd 15591 (1998*), recon. dismissed*, 15 FCC Rcd 19648 (2000), the Commission properly rejected an agreement with a conflicting applicant at Mineral Wells, Texas, to amend its application to specify a different transmitter site in exchange for compensation in excess of its expenses. *Id.*, 13 FCC Rcd at 15594-95 [¶ 11-13]. Similarly, in *Banks, Oregon et al.*, 13 FCC Rcd 6596, *recon denied*, 16 FCC Rcd 2272 (2001), the Commission properly rejected an agreement with a conflicting applicant at Corvallis, Oregon, to amend its pending application to downgrade from Class C to C1 in exchange for compensation in excess of expenses. *Id.*, 16 FCC Rcd at 2273 [¶2] The potential for abuse in that situation was even more obvious since the Class C application was filed after the petition and before the close of the comment period. This case does not fall into the prohibitions of that line of cases. Unlike the applicant in *Detroit, Texas* or *Banks, Oregon*, AM & PM is not being compensated for amending or withdrawing a pending application. Moreover, unlike the applicant in *Banks, Oregon*, AM & PM filed its Class C1 application *before* the initiation of the rule making proceeding, and thus would not have filed it for any abusive purpose because it did not know that a subsequent rule making proposal was to be filed.

8. AM & PM and the Joint Parties structured their agreement with knowledge of and in reliance on the Commission's prior decisions under Section 1.420(j). As required under those decisions, the Joint Parties did not pay AM & PM for the withdrawal, dismissal, or amendment of a pending application, or for the withdrawal or dismissal of any expression of interest. Since

there was no agreement, written or oral, regarding the withdrawal or dismissal of an expression of interest, Section 1.420(j) does not apply and therefore it is not necessary to submit the agreement.

9. The Commission's Request for Supplemental Information also states that the Joint Parties proposal to eliminate the short spacing between Channel 230C1 at Krum and Channel 230C1 at Archer City is contingent upon the subsequent filing and grant of AM & PM's application to downgrade Station KICM from Channel 230C1 to Channel 230C2. The Joint Parties presume that the Commission's policy against granting proposals contingent upon a subsequent filing is based on the case of *Cut and Shoot, Texas*, 11 FCC Rcd 16383 (1996). But the difference between the *Cut and Shoot* type of cases and the present arrangement is that in *Cut and Shoot* and its progeny, the rule making proponent had not entered into a binding agreement with the other party to ensure that the conflict would be eliminated. The Commission should allow this contingency as an exception to the Cut and Shoot doctrine, just as Section 73.3517(e) is an exception in the application context. Under Section 73.3517(e) if parties enter into an agreement to eliminate a spacing violation and file their applications simultaneously, the Commission will permit the contingency. That is how the parties intend to implement this rule making proposal by simultaneously filing contingent applications as contemplated by the Commission's ruling in its *Technical Streamlining* decision in MM Docket No. 98-93, 13 FCC Rcd 14849 at 14854-56. The Commission should not make a distinction between applications filed outside a rule making context and here, where, the agreement is made between parties in a rule making context.

10. Accordingly, the Joint Parties urge the Commission to grant their pending counterproposal.

Respectfully submitted,

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April 26, 2002

CERTIFICATE OF SERVICE

I, Lisa Marie Balzer, do hereby certify that I have on this 26th day of April, 2002, caused to be mailed by first class mail, postage prepaid, copies of the foregoing **"Response to Request for Supplemental Information"** to the following:

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